IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

ROGERS PARK WATER COMPANY,
Plaintiff in Error,

vs.

JOHN B. FERGUS,
Defendant in Error.

} ERROR TO SUPREME COURT OF ILLINOIS.

Brief and Argument for Defendant in Error.

A Federal question was argued in this case in the Supreme Court of Illinois. That question was as follows: If the Board of Trustees of the village of Rogers Park did, November 12, 1888, pass the ordinance shown on pages 71 to 79 of this Record, then did that ordinance, and the acceptance of the same, and the construction of water-works thereunder, constitute a contract giving to Keeler and his assign, the plaintiff in error, the right to collect, from private water-takers, the prices, charges or rates specified in the ordinance for a period of thirty years, the obligation of which was impaired by the ordinance passed October 18, 1897 (Rec. p.

67), by the City Council of the City of Chicago, after the annexation of Rogers Park to Chicago, establishing, as the maximum rates to be charged by the plaintiff in error to private water-takers, rates lower than those specified in the ordinance of November 12, 1888; and would an enforcement of the ordinance of October 18, 1897, take property of plaintiff in error without due process of law?

The village of Rogers Park and the city of Chicago were at the several dates mentioned, applicable to them respectively, incorporated under Chapter 24, Revised Statutes of the State of Illinois, and the several acts supplemental thereto and amendatory thereof, all of which statutes and acts were adopted and passed subsequent to the adoption of the Constitution of 1870, and therefore subject thereto.

Sec. 14, Art. 2, Const. 1870, is as follows: "No ex-post-facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

The only legislative authority under which the Board of Trustees of the village of Rogers Park could act in passing the ordinance, claimed to have been passed November 12, 1888, is Sec. 1, Art. 9, Chap. 24, Rev. Stat. Ills., which is as follows: "The "City Council or Board of Trustees shall have the "power to provide for a supply of water by the "boring and sinking of artesian wells, or by the "construction and regulation of wells, pumps, cis- "terns, reservoirs, or water-works, and to borrow "money therefor, and to authorize any person or

"private corporation to construct and maintain the "same at such rates as may be fixed by ordinance, "and for a period not exceeding thirty years. * * "

[Plaintiff in error did, however, contend in the court below that the Board of Trustees had power to pass the ordinance claimed to have been passed November 12, 1888, by virtue of an act of the General Assembly of the State of Illinois, in force July 1, 1885, entitled "An Act to enable cities, in- "corporated towns and villages to contract for a "supply of water for public use, and to levy and "collect a tax to pay for the water so supplied." That act is as follows (omitting the enacting clause): "Sec. 1.—That in all cities, incorporated "towns and villages where water-works have been "or may hereafter be constructed by any person "or incorporated company, the city, town or village "authorities in such cities, incorporated towns and "villages may contract with such person or incor- "porated company for a supply of water for public "use for a period not exceeding thirty years.

"Sec. 2.—Any such city or village so contracting "may levy and collect a tax on all taxable prop- "erty within such city or village, to pay for the "water so supplied."

This act clearly intends to provide for a supply of water for public use, as distinguished from private use, for it is apparent that no legislature could provide for the payment for water used by private individuals by a general tax on the taxable property of the municipality.

Sec. 13, Art. 14, Constitution of Illinois, 1870,

provides that "no act hereafter passed shall em-"brace more than one subject, and that shall be "expressed in the title." The title to this act is: "An Act to enable cities, incorporated towns and "villages to contract for a supply of water for pub-"lic use and to levy and collect a tax to pay for the "water so supplied," which clearly precludes any such application of it as to empower an incorporated village to fix water-rates for water supplied to private consumers.

This is mentioned parenthetically because, in argument in the courts below, plaintiff in error claimed that this act conferred on the village of Rogers Park the power to fix water-rates, to be unchangeable for a period of thirty years, and if its contention had any foundation the language used is much stronger and less equivocal than that used in the section of Chap. 24, R. S., before quoted.]

The only authority under which the City Council of the city of Chicago passed the ordinance of October 18, 1897, is an act of the General Assembly of the State of Illinois, in force July 1, 1891, in one section which is as follows: "That the corporate "authorities of any city, town or village, now or "hereafter incorporated under any general or "special law of this State, in which any individual, "company, or corporation has been, or hereafter "may be, authorized by such city, town or village "to supply water to such city, town or village and "the inhabitants thereof, be and are hereby em-"powered to prescribe by ordinance maximum

"rates and charges for the supply of water fur-
"nished by such individual, company or corpora-
"tion to such city, town or village and the inhabi-
"tants thereof, such rates and charges to be just
"and reasonable, and in case the corporate au-
"thorities of any such city, town or village shall
"fix unjust and unreasonable rates and charges,
"the same may be reviewed and determined by
"the Circuit Court of the county in which such
"city, town or village may be."

Plaintiff in error was incorporated under Chap. 32, Rev. Stat. Ills., adopted subsequent to the adoption of the Constitution of 1870, Sec. 9 of which chapter is as follows: "The General As-
"sembly shall, at all times, have power to prescribe
"such regulations and provisions as it may deem
"advisable, which regulations and provisions shall
"be binding on any and all corporations formed
"under the provisions of this act."

Such being the state of the law, defendant in error applied to plaintiff in error for water, tendering water-rates under the Chicago ordinance of 1897, which application was denied and defendant in error filed his petition for mandamus to compel plaintiff in error to furnish water (Rec. pp. 6-9), in which no mention was made of any ordinance of the village of Rogers Park. A demurrer to the petition (Rec. pp. 10,11) was overruled (Rec. p. 63), and plaintiff in error answered (Rec. pp. 12-25).

Subsequently, plaintiff in error filed its amended answer (Rec. pp. 30-56), dividing the same

into three parts, designating each part an answer. In the first it (1) admitted that defendant in error was the occupant of the premises described in the petition, but denied the dimensions and appliances contained therein as alleged; (2) admitted that the premises described in the petition were situated in Rogers Park, the annexation of the latter to Chicago, and that Rogers Park was and Chicago is a municipal corporation as alleged in the petition; (3) alleged that said village being desirous of obtaining a supply of water for public use passed an ordinance November 12, 1888 (setting out the same, Rec. pp. 30-37), giving to one Keeler and his assigns the exclusive right to construct, maintain, and operate a water-works system in said village for a period of thirty years and lay its pipes in the streets; Section 12 of which (Rec. p. 36) is as follows: "The said "grantee or assigns shall charge the following "annual water-rates to consumers of water during "the existence of this franchise," etc., which section included a "Tariff of Water Rates;" (4) admitted that it was a corporation organized and having the corporate purposes as alleged in the petition; (5) alleged that the ordinance of November 12, 1888, was assigned by Keeler to plaintiff in error; (6) admitted that in pursuance of the objects of its incorporation plaintiff in error did construct a water-system in Rogers Park, and alleges that the same was done by authority and in virtue of said ordinance, and that the same became and was a contract between plaintiff in

error and the village and city; (7) admitted that it had laid a water-pipe connected with its works in the street in front of the premises of defendant in error, to which were attached the appliances in said dwelling house; (8) admitted that on and before October 4, 1897, there was an ordinance in force in the city of Chicago fixing city water-rates as alleged in the petition, but denies under such rates those due on the dwelling of defendant in error were as alleged in the petition; (9) denied that on October 4, or any other time, the city of Chicago passed a valid ordinance fixing maximum rates to be charged by plaintiff in error and alleges if any such ordinance was passed it was illegal and void; (10) admitted tender by defendant in error and refusal of acceptance of same as alleged in the petition. In the second part or answer it (1) alleged that defendant in error on May 17, 1897, applied for water (application set out Rec. p. 41) whereby defendant in error contracted to pay the tariff rates set up in the ordinance for so long a time as he should desire to have a supply of water, and that by reason of his refusal to pay the same, and not otherwise, plaintiff in error had shut off his water. In third part or answer it (1) alleged that the village of Rogers Park being desirous of obtaining a supply of water for public use and being prohibited by law from raising the amount of money necessary therefor, passed an ordinance granting to Keeler the right to construct the same, and set out again the ordinance as in the first part or answer; that said

ordinance was passed to enable Keeler to negotiate with other persons, on the faith of the ordinance, to obtain necessary capital to construct; that Keeler did negotiate with other persons and on the faith of said ordinance plaintiff in error was incorporated and necessary funds raised by subscription to stock and sale of bonds and a water-works system was constructed; (2) that the ordinance and rights thereunder were assigned January 31, 1889, by Keeler to plaintiff in error; that plaintiff in error constructed the water-works system, which was accepted by the village, and from time to time extended under orders from the village and, after annexation, from the city; (3) that defendant in error had a well and pump of his own, and was provided with water from the same; (4) that the rates demanded of defendant in error were those prescribed in the ordinance; (5) that the ordinance with the acceptance and construction of the works thereunder constituted a contract.

To this answer defendant in error demurred in part and pleaded in part. He demurred generally to all of the third part of the answer (Rec. p. 57), and specially to those parts of the first part of the answer which alleged (1) (Rec. p. 56) that if the city did pass an ordinance and fixing maximum rates to be charged by plaintiff in error such ordinance was without authority and was illegal and void, and (2) (Rec. p. 57) which alleged that a contract existed between plaintiff and defendant in error, whereby the latter was obligated to pay

ordinance rates so long as he should desire the water supply.

He pleaded (1) (Rec. p. 58) that his petition was true as to the size of his building and the appliances therein; (2) (Rec. p. 58) that the village of Rogers Park did not pass the ordinance as alleged on November 12, 1888, or any other time; (3) (Rec. p. 58) that plaintiff in error did not by assignment or otherwise become possessed of the rights, etc., alleged to have been granted to Keeler by ordinance; (4) (Rec. p. 58) that no contract ever existed between the plaintiff in error and the village or city by reason of the ordinance alleged to have been passed November 12, 1888; (5) (Rec. p. 59) that the rates, according to the city ordinance, were not in excess of the sum tendered; (6) (Rec. p. 59) that the rules or regulations of plaintiff in error did not prescribe water-rates.

Thereafter plaintiff in error filed its joinder in demurrer to the three demurrers of defendant in error and asked that they be carried back to the petition, and joined issue on the several pleas.

The court (Rec. p. 64) sustained the demurrers of defendant in error, and overruled the demurrers of plaintiff in error, and the latter elected to stand by its respective answers and demurrers.

The case then went to trial on the issues of fact so joined before the Court and a jury, and after the evidence was all in, and after refusing all the instructions offered by plaintiff in error (Rec. pp. 90-91), the Court instructed the jury (Rec. p. 90) to find the issues for defendant in error, which the

jury did accordingly (Rec. p. 61). Plaintiff thereupon entered oral motions for a new trial and in arrest of judgment, both of which were overruled (Rec. pp. 91, 92), and judgment was entered (Rec. pp. 61, 62) for a peremptory writ of mandamus.

No motion in writing for a new trial was filed as required by Sec. 57, Chap. 110, Rev. Stat. Ills., as follows: "If either party may wish to except "to the verdict, or, for other causes, to move for a "new trial or in arrest of judgment, he shall, be-"fore final judgment be entered, or during the term "it is entered, by himself or counsel, file the points "in writing, particularly specifying the grounds of "such motion."

As appears from the foregoing, that there were certain issues of fact presented to the jury, one of which went to the whole cause of action, namely, the allegation by answer that there was ever any ordinance passed by the Board of Trustees of the village of Rogers Park giving to Keeler and his assigns any authority to construct and maintain water-works which fixed water-rates to be charged consumers or fixed any period during which any rights should be enjoyed, or any rates which should remain unchanged. Another question of fact was whether or not the dwelling of defendant in error was of the dimensions and contained the fixtures alleged in the petition; another was whether or not the rules and regulations, referred to in the application for water, made by defendant in error May 17, 1897, contained water-rates. The main issue of law was whether the ordinance of

Rogers Park, if one ever was passed, constituted such a contract as under it plaintiff in error could, during a period of thirty years, maintain, unchanged, a schedule or tariff of water-rates collectible from private consumers, the obligation of which would be impaired or property would be taken without due process of law, by subsequent legislation fixing a different and lower schedule, the question of the reasonableness of the rates in either instance not being raised.

The Supreme Court of Illinois decided against the contention that the city ordinance impaired the obligation of a contract, or took property without due process of law, and therefore this Court takes jurisdiction, if the case be properly removed here by writ of error. If the Federal question "was erroneously decided against plaintiff in "error, then this Court must further inquire, "whether there is any other matter or issue ad- "judged by the State Court which is sufficiently "broad to maintain the judgment of that Court, "notwithstanding the error in deciding the issue "raised by the Federal question. If this is found "to be the case, the judgment must be affirmed "without inquiring into the soundness of the de- "cision on such other matters or issues."

Murdock vs. Memphis, 20 Wall., 590, 636.

"It has been the uniform doctrine of this Court "that, where it appears that the judgment of the "State Court must be affirmed on other grounds "disclosed in the Record, it will not be reversed

"for an erroneous ruling of the State Court on a "Federal question not necessary to the decision of "the cause."

Crescent Live Stock Co. v. Butchers' Union, 120 U. S., 141, 156.

Inasmuch as the rules of this Court do not require plaintiff in error to file its brief and argument in such time that will insure to defendant in error an examination of the same and follow it in his reply thereto, the same sequence of points will be made in this argument as was made in the Supreme Court of Illinois.

BRIEF OF AUTHORITIES.

I.

The several orders on the trial court on the demurrers were not erroneous.

People ex rel v. Pavey, 151 Ill., 101.
C. C. Ry. Co. v. People, 73 Ill., 541.
Belleville v. Ry. Co., 152 Ill., 171.
State v. County Judge, 7 Clarke (Iowa), 186.
Coffyn v. State, 91 Ind., 324.
Connor v. Morris, 23 Cal., 447.
Met. City Ry. Co. v. C. W. D. Ry. Co., 87 Ill., 317.
C. W. I. R. R. Co. v. Dunbar, 100 Ill., 110.
Hangen v. Abilena L. & W. Co., 14 L. R. A., 424.

II.

There was no error in refusing defendant's instructions, and in directing a verdict for petitioner.

Anderson v. McCormick, 129 Ill., 308.
Bradish v. Grant, 119 Ill., 606.

III.

No contract existed between the parties to this suit when the petition was filed, and no valid contract ever existed binding the appellee as claimed.

L. S. & M. S. R. R. v. Richards, 152 Ill., 59. S. C., 30 L. R. A., 33.
Am. W. W. Co. v. State, 46 Neb., 194; 64 N. W., 711.

IV.

The General Assembly possesses all legislation powers not expressly reserved by the Constitution.

Sawyer v. Alton, 3 Scam., 127.
Mason v. Wait, 4 Scam., 127.
People v. Wall, 88 Ill., 75.
Harris v. Whiteside Co., 105 Ill., 445.
Winch v. Tobin, 107 Ill., 212.

A municipal corporation has no power, except expressly granted or necessarily implied from those expressly granted.

Alton v. Aetna Ins. Co., 82 Ill., 45.
Agnew v. Brall, 124 Ill., 312.
Smith v. McDowell, 148 Ill., 51.

A person or private corporation claiming a special privilege, the subject of legislative grant, is held to the strictest account as to his or its authority.

Jackson Co. H. R. Co. v. Interstate R. T. Co., 20 Fed., 306.

IV. A.

Section 14, Article II., Constitution of 1870, prohibits the irrevocable grant of the special privilege of maintaining a fixed schedule of rates and charges for water to be paid by private consumers.

Indianapolis St. Car Co., Case 56, Fed., 746; 166 U. S., 562.

Wagner v. Rock Island, 146 Ill., 139.

Crumley v. Watauga W. Co., 41 S. W. Rep., 1058.

Lumbard v. Stearns, 4 Cush., 60.

Wheeler v. North, Colo. Irr. Co., 10 Colo., 582.

Hangen v. Abilena L. & W. Co., 14 L. R. A., 424.

People v. Green Island W. Co., 56 Hun., 76.

Spring Valley W. W. v. Schottler, 110 U. S., 347.

Smyth v. Ames, 169 U. S., 466.

IV. B.

The General Assembly, aside from any express constitutional limitation, has no power, either directly or through authority which is vested in its municipalities, to irrevocably establish a schedule of water-rates and charges to be paid by private consumers during any specified period.

Ruggles v. People, 91 Ill., 256.
Smythe v. Ames, 169 U. S., 466.
Cooley Const. Lim., 6th Ed., 146, 343, 349.
E. St. Louis v. E. St. L. G. L. & C. Co., 98 Ill., 415.
Milliken v. Edgar Co., 142 Ill., 528.
Carlyle v. Carlyle W. L. & P. Co., 52 Ill. App., 577.

IV. C.

The village ordinance is void under the Fourteenth Amendment to the Constitution of the United States, in as much as it takes the property of the consumer of water without due process of law.

Smythe v. Ames, 169 U. S., 446.

IV. D.

The General Assembly, by Section I, Article X., Chapter 24, Revised Statutes, did not empower the Village Board to irrevocably establish a schedule of water-rates and charges to be paid by private consumers.

I. C. R. R. v. People, 95 Ill., 313.
Ruggles v. People, 91 Ill., 256.

IV. E.

The appellant is subject to any regulation or provision that the General Assembly may at any time deem advisable to prescribe.

Ford v. Chicago M. D. Assn., 155 Ill., 166.
Pa. Coll. cases, 13 Wall., 190.
Miller v. N. Y., 15 Wall., 478.
Shields v. Ohio, 95 U. S., 319.
Greenwood v. Freight Co., 105 U. S., 13.
Spring Valley W. W. v. Scholtter, 110 U. S., 347.
Sioux City St. R. R. Co. v. Sioux City, 138 U. S., 98.
State v. R. R. Tax Com., 37 N. J. L., 228.
Inland Fisheries v. Holyoke W. P. Co., 104 Mass., 446.
S. C., 15 Wall., 500.

IV. F.

The Village Board of Rogers Park did not pass the ordinance in question November 12, 1888, and there is no evidence in that Record that the same ever was passed.

Lindsay v. Chicago, 115 Ill., 120.
Ryan v. Lynch, 68 Ill., 160.
I. C. R. R. Co. v. People, 143 Ill., 434.
Myers v. Vanderbilt, 84 Pa. St., 510.
Est. Tomlinson, 133 Pa. St., 245.

ARGUMENT.

I.

Counsel for plaintiff in error in the courts below contended that the original petition was insufficient in law because it did not set out some ordinance or other municipal action under which the water company distributed water through pipes laid in the street. It is submitted that that question was not and could not have been in issue in this case.

In People ex rel. v. Pavey, 151 Ill., 101, it was held that the pleadings in mandamus under the Illinois statute were governed by the ordinary common law rules. It would have been sufficient in this petition to have alleged that plaintiff in error was a public seller of water in order to fix its clear legal duty to furnish water to defendant in error upon a proper tender of charges. It has been held, repeatedly, that the authority which such a corporation has, its powers, its franchise, is from the statutes, that which comes from the municipality being a mere license.

> Chicago City Ry. Co. v. People, 73 Ill., 541.
> Belleville v. Ry. Co., 152 Ill., 171.

It does not matter to defendant in error, then, in what form that license came, or, even if it be but a tacit permission. If this company had constructed its works and laid its pipes without any express authority from the municipality, its char-

acter as a distributor of water to those desiring it would not be changed.

In State v. County Judge, 7 Clarke (Ia.), 186, the Court held that when the facts stated show a duty to be performed it is not necessary to set out or allege the law. Here the expressed purpose of incorporation and the carrying out of that purpose impose the duty, and no more need be alleged to fix that duty, as one, the performance of which can be compelled by mandamus.

So, too, in Coffyn v. State, 91 Ind., 324, the allegation that a railroad had been permanently located in a township was sufficient, without alleging that the same had been judicially determined.

See, also, Connor v. Morris, 23 Cal., 447, in which it was held that the presumption is that certain warrants were drawn by the auditor according to law, and that if they were not it was a matter of defense to be set up by respondent. And this was the answer of the trial judge to the argument of plaintiff in error on demurrer to the petition. The company is doing business; it is occupying streets with its pipes; the presumption is that it is there by some authority from the municipality. But if it were there as a trespasser upon the public streets that fact would constitute no defense to it in this action, nor give defendant in error any better right to the relief he demanded. If defendant in error had alleged as this argument and this record shows that he would have been obliged to allege, to comply with the contention of plaintiff in error, that it had no authority by ordinance to

lay pipes, but, that, notwithstanding it had laid pipes and was supplying water under its charter powers, it would have made no difference in the issue that could be tried by mandamus.

If this contention should prevail, then in every petition for a mandamus to a public officer there would necessarily be an allegation of when, where, and how he was elected; and for a writ to a railroad company it would be necessary to allege its charter, and the location of its road, and, when the duty sought to be enforced was one arising because of its operation in or through a municipality, the ordinance granting it permission would have to be pleaded; but the contrary is the law, for when one holds himself out as a public officer he can be compelled to perform the duties of the office whether his status be de facto or de jure, and the same applies to a quasi-public corporation.

A somewhat analogous position was taken in Met. City Ry. Co. v. C. W. D. Ry. Co., 87 Ill., 317, and C. & W. I. Ry. Co. v. Dunbar, 100 Ill., 110, and it was contended that these companies could not secure right of way by condemnation until they had secured ordinance rights from the city, but the Court held that the power to secure right of way by condemnation or otherwise came from their charters, and that the right obtained, or to be obtained from the city, was a mere license or designation of location.

Hangen v. Abilena L. W. Co., 14 L. R. A., 424, 428.

But plaintiff in error waived this point by answering over after its demurrer to the petition was overruled.

II.

There was no error in refusing the instructions asked by plaintiff in error, and in instructing the jury to find the issues for the petitioner.

When this case came to trial, there were three issues of fact presented by the pleadings:

First.—On the sufficiency of petitioner's tender under the terms of the city ordinance, and the only element of that tender, not admitted, was whether the premises were of the dimensions and contained the fixtures alleged.

Second.—On the passage by the Village Board of Rogers Park of an ordinance, November 12, 1888.

Third.—Whether the rules and regulations of the company referred to in the application for a water supply embraced a schedule of water-rates.

On this first issue, the burden was on the petitioner and it was proven without any evidence adverse, either drawn out on cross-examination, or introduced by plaintiff in error.

Under the ruling in Anderson v. McCormick, 129 Ill., 308, 317, the Court properly instructed the jury to find for petitioner so far as this issue was concerned.

On the second issue the burden was on the defendant, who introduced in evidence a copy of an

ordinance certified by the city clerk. This was admissible for it prima facie maintained the issue in behalf of defendant and being so admissible it could not be ruled out when overcome by better evidence. To rebut this, petitioner introduced the journal of the Village Board, which, being better evidence, then the certified copy and contradictory thereof, overcame it, and under the ruling in Bradish v. Grant, 119 Ill., 606, the Court properly instructed the jury as to its finding on this issue.

On the third issue the burden was on the defendant below, who abandoned it and did not offer any evidence in support of it, and on that issue the Court properly directed a verdict.

But even if the trial court was wrong in directing a verdict, the appellate court can not review the evidence to ascertain if the instruction was or was not warranted by the evidence because the plaintiff in error did not file its points in writing specifying the grounds of its motion for a new trial as required by Sec. 57, Chap.. 110, Rev. Stat. Ill.

> St. Louis R. R. v. Dorsey, 68 Ill., 326.
> Continental Investment Co. v. Schubnell, 63 Ill. App., 379.

For this reason alone, the Supreme Court of Illinois should have affirmed the judgment of the trial court.

III.

No contract existed between the parties to this suit when the petition was filed, and none is shown ever to have existed, which bound defendant in error to pay the water-rates alleged to have been fixed by an ordinance of Rogers Park.

Plaintiff in error contended that defendant in error was bound by contract to pay the water-rates claimed to have been established by ordinance by the Board of Trustees of Rogers Park, so long as he should take water from plaintiff in error. This claim is based upon an application signed by defendant in error, May 17, 1897 (Rec. pp. 23, 41, 70), in which he applied to plaintiff in error for water to be furnished to the premises in question, which application contains the following language: "Said water to be supplied subject "to the rules and regulations of said company, "now in force, or which may hereafter be enacted "or adopted, which rules and regulations are here-"by made and declared to be part of the contract "between me and said company for supplying said "premises with water."

No evidence was offered on the trial as to what the rules and regulations of plaintiff in error contained, but the allegations of the answer are that the schedule of water-rates was fixed by village ordinance and it is nowhere alleged or proven that any schedule of rates was established by rule or regulation enacted or adopted by the company,

nor that any such rule or regulation required the water consumer to continue taking water for any specified period.

It was alleged in answer and admitted by demurrer that in pursuance of this application defendant in error paid rates demanded by plaintiff in error and received water up to November 1, 1897, that he then refused to pay for the succeeding half year the rates so demanded, whereupon plaintiff in error cut off the water from his premises; that he then tendered the amount which he claimed would be due, computing under the city ordinance, and demanded that the water be turned on, and upon refusal this petition was filed.

It is submitted, in the first place, that if any contract of any kind ever had been in force between these parties, it was no longer in existence or in force when this petition was filed.

Even if it be assumed that signing this application, and paying such rates as were then demanded for the then current half year, did constitute a contract whereby plaintiff agreed to furnish water, and appellee agreed to pay for it at the same rates during all the time the latter should desire water, even such a contract was annulled and canceled and ceased to have life, when plaintiff in error shut off the water and refused to supply it. One can not eat his cake and keep it, too. When defendant in error refused to pay and still demanded water, plaintiff in error had its election, to rescind the contract altogether or to keep on furnishing and hold defendant in error to

the terms of any contract he had made regarding payments.

> L. S. & M. S. R. R. v. Richards, 152 Ill., 59, and notes to the same case in 30 L. R. A., 33, 40.

It is therefore manifest that if any contract ever did exist between these parties, regarding the furnishing of water by one and the paying for it by the other, it was out of existence when this petition was filed, and their relations on the subject were the same as if no contract had ever existed at any time.

But this is proceeding upon an assumption that has no foundation in the facts disclosed by the record. The contention all through is that the rates and charges for water are inflexibly established, not by any rule or regulation emanating from the company but by an ordinance passed by the Village Board.

It would be a most far-reaching construction to hold that when defendant in error applied for water, without stating any period for which he wanted it, and paid six months in advance, what was demanded of him, and agreed that the "rules "and regulations of said company should be part "of the contract between me and said company "for supplying said premises with water," he was thereby bound for so much of the succeeding twenty-one years as he should need the company's water, by anything outside of those rules and regulations, whether the same be village ordinances

or what not. If the company had rules and regulations they should have been offered in evidence that the Court might see whether they contained any allusion to rates, or to the period for which any applicant bound himself. If it had no rules and regulations and wanted to bind any applicant to the terms of the ordinance, it should have been so stated in the form of application. No doubt the company was at perfect liberty to adopt or enact a rule or regulation materially decreasing the rates and charges. Has the Court any right to assume then that the rule of the company, as to rates or period of user in 1897, was the same as that fixed by ordinance in 1888?

If, however, the rule or regulation, to which plaintiff in error claims defendant in error subscribed, was that he should for a period of twenty-one years pay certain rates whether they were reasonable or not, it was an unreasonable rule and could not be enforced. Rules and regulations of a company of this nature must be reasonable.

> Am. N. W. Co. v. State, 46 Neb., 194, and cases cited.

IV.

Rules of construction affecting the powers of the General Assembly, municipal corporations, and private corporations, respectively.

Plaintiff in error claims the right to maintain, unchanged, for a period of thirty years from November 12, 1888, a certain schedule of rates and

charges for water, which it supplies to private consumers, which schedule, it claims, was established by an ordinance of the Board of Trustees of the village of Rogers Park, passed November 12, 1888.

The Village Board could only have been empowered to pass such an ordinance by Sec. 1, Art. X., Chap. 24, Rev. Stat. Ill., which chapter was the village charter. The General Assembly, in passing, said Section 1 was limited by Sec. 14, Art. H., of the Constitution of Illinois of 1870, and by other sections of that Constitution and by the Constitution of the United States.

The General Assembly of a State possesses unlimited legislative powers, unless expressly and unequivocally restrained by the Constitution, but, when there is an express and unequivocal constitutional restriction, it is absolutely binding and any act in violation thereof is void.

Sawyer v. Alton, 3 Scam., 127.
Mason v. Wait, 4 Scam., 127.
People v. Wall, 88 Ill., 75.
Harris v. Whiteside Co., 105 Ill., 445.
Winch v. Tobin, 107 Ill., 212.

A municipal corporation has no power, except expressly granted, or necessarily implied, from those expressly granted.

Alton v. Aetna Ins. Co., 82 Ill., 45.
Agnew v. Brall, 124 Ill., 312.
Smith v. McDowell, 148 Ill., 51.

A person or private corporation claiming a special privilege, the subject of legislative grant is held to the strictest account as to his or its authority.

These principles are most tersely stated in Jackson County Horse R. Co. v. Interstate Rapid Transit Co., 20 Fed., 306, in language which should meet the commendation and approval of this Court, and found on page 307, as follows: "Let me in the outset formulate two or three un-"questioned propositions: (1) The legislature has, "as the general representative of the public, the "power, subject to specific constitutional limita-"tions, to grant special privileges; (2) it may, with "similar limitations, grant the like power to "municipal corporations as to all matters of a "purely municipal nature; but (3) as the posses-"sion by one individual of a privilege, not open to "the acquisition by others, apparently conflicts "with that equality of rights which is the under-"lying principle of social organization and popular "government, he who claims such exclusive privi-"lege, must show clear warrant of title, if not also "probable corresponding benefit to the public. "Hence, the familiar rule that charters, grants of "franchises, privileges, etc., are to be construed in "favor of the government. Doubts as to what is "granted are resolved in favor of the grantor, or "as is often epigrammatically said, 'a doubt de-"stroys a grant.'"

Plaintiff in error, claiming, under an ordinance of the village of Rogers Park, the irrevocable

privilege of maintaining a certain schedule of rates and charges for water to be furnished to private consumers, exclusive within a certain territory, during a period of thirty years from and after November 12, 1888, in showing its "clear warrant of title" so to do, it must appear:

FIRST.—That the General Assembly was not prohibited by the Constitution from granting such privilege, or authorizing its creature, the Village Board, to grant it.

SECOND.—That the General Assembly, either directly or by a delegation of power, through the Village Board, had, aside from any express constitutional limitation, the power to irrevocably establish a schedule of water-rates and charges to be paid by private consumers, during a period of thirty years, or during any other specified period.

THIRD.—That, under the 14th Amendment to the Constitution of the United States, the ordinance claimed to have been passed November 12, 1888, is prima-facie valid.

FOURTH.—That the General Assembly did by Sec. 1, Art. X., Chap. 24, R. S., or otherwise, empower, or attempt to empower, the corporate authorities of any municipality in the State of Illinois to irrevocably establish a schedule of water-rates and charges to be paid by private consumers for any stated period.

FIFTH.—That the reservation clause of the general incorporation act, to-wit., Sec. 9, Chap. 32, R. S., does not subject plaintiff in error to what-

ever rules and regulations the General Assembly might at any time deem advisable to prescribe, including the regulation of its rates of charges.

SIXTH.—That the Village Board of the village of Rogers Park did pass the ordinance of November 12, 1888, which is claimed by plaintiff in error was passed.

SEVENTH.—That the alleged ordinance of November 12, 1888, did establish irrevocably, for a period of thirty years, a schedule of rates and charges for water to be supplied to private consumers.

IV. A.

Section 14, Article II., Constitution Illinois, 1870, prohibits the irrevocable grant of the special privilege of maintaining a fixed schedule of rates and charges for water to be paid by private consumers.

Sec. 14, Art. II., of the Constitution of 1870, is as follows: "No ex-post-facto law, or law impair-"ing the obligation of contracts, or making any "irrevocable grant of special privileges or immuni-"ties, shall be passed." Shorn of language, not applicable to this issue, the section would read as follows: "No law making any irrevocable grant "of special privileges shall be passed." Consequently this branch of the argument resolves itself into the disposition of these inquiries: First.—Is the authorization, under which plaintiff in error claims, a law? Second.—Is it, in terms, an irrevocable grant? and, third, is it a grant of a special privilege?

FIRST.

Sec. 1, Art. X., Chap. 24, Rev. Stat. Ill., under which chapter the village of Rogers Park was, in November, 1888, organized, is as follows: "The "City Council or Board of Trustees shall have the "power to provide for a supply of water by the "boring and sinking of artesian wells, or by the "construction and regulation of wells, pumps, cis- "terns, reservoirs, or water-works, and to borrow "money therefor, and to authorize any person or "private corporation to construct and maintain the "same at such rates as may be fixed by ordinance, "and for a period not exceeding thirty years; also "to prevent the unnecessary waste of water; to "prevent the pollution of the water, and injuries to "such wells, pumps, cisterns, reservoirs, or water- "works." Again eliminating language immaterial to this issue, the section would read as follows: "The Board of Trustees shall have the power to "provide for a supply of water, and to authorize "any person or private corporation to construct "water-works and maintain the same at such rates "as may be fixed by ordinance, and for a period "not exceeding thirty years." No other part of the village charter nor any other law of the State can, with any degree of reason, be claimed as vesting in the Board of Trustees the power to pass the ordinance in question.

It is clear that the act itself and alone gave no authority to Keeler to construct water-works, or to supply water to private consumers, nor did it establish a schedule of rates or charges and it

is equally clear that without the authority conferred by this act the Village Board could not authorize him to do anything in the premises.

By a clause of Sec. 22, Art. IV., of the Constitution of Illinois, the General Assembly is prohibited from passing any local or special law "granting to "any corporation, association or individual any "special or exclusive privilege, immunity, or fran-"chise whatever." In consequence of which, it passed the general law, embraced in the above-quoted section of the city-and-village act, and in pursuance thereof, municipal authorities pass ordinances designating the particular individuals and the particular localities which shall come under the operation of the act. The actions of the two legislative bodies, the General Assembly and the municipal council, combined, constitute the grant of authority; each is a necessary element before the whole is complete.

This Court has repeatedly passed upon the character of this duplex legislation, in determining its jurisdiction.

In the Indianapolis Street Car Company case, 56 Fed., 746; 166 U. S., 562, this question was directly in issue. Under the old city charter, one street railway company, incorporated under a general law, was by ordinance, given certain privileges; under a later city charter, another street railway company, also incorporated under a general law, was, by ordinance, given certain privileges which conflicted with the privileges granted to the first company. Both corporations were citizens of In-

diana. The first company filed its bill in the Circuit Court for the District of Indiana, to enjoin the second company from acting on the ground that it (the first) had contract privileges under the old city charter and the old ordinance, the obligations of which were impaired by the second ordinance passed under authority of the new charter, in violation of the Federal Constitution, which forbids the States from passing laws in impairment of the obligation of contracts, and it was there contended that the Court had no jurisdiction, because, if the obligation of the contract embodied in the old charter and the old city ordinance was impaired it was done by the later ordinance, and not by any State law. Judge Baker of the Circuit Court, in disposing of this question, says: "The "easement to occupy and enjoy the streets of the "city for the purpose of constructing, maintaining, "and operating a street-railway system therein, "can alone be granted by the Legislature. With-"out legislative grant the use of the streets of the "city for such a purpose would constitute a public "nuisance, it is equally clear that in the absence of "a legislative grant of anything to it, the city can "not confer upon any person or corporation the "right to lay, maintain, and operate a railway upon "and along any public street or alley therein. The "easement is a legislative grant of authority to it, "whether made directly by the Legislature itself, "or any of its properly constituted instrumental-"ities. Waite, C. J., in Wright v. Nagle 101 U. S., "794. The authority exercised by the city in grant-

"ing to the defendant the right, privilege or ease-
"ment to lay, maintain and operate a street
"railway upon and along its public streets is that
"of the State itself. It is none the less a legislative
"grant by the State because the authority to make
"it is conferred upon a subordinate body, to which
"the Legislature has delegated a portion of its
"powers. If the authority exercised be that of the
"State itself, whether acting directly through its
"Legislature, or indirectly through a subordinate
"body, to which the Legislature has delegated a
"portion of its powers, it is competent for this
"Court to inquire whether it has exceeded its
"authority and violated the constitutional provi-
"sion in question. Saginaw Gas Light Co. vs. City
"of Saginaw, 28 Fed., 529."

The Court then proceeds to review a large number of authorities upon this proposition, and sums up the matter thus, discussing the case of Shreveport v. Cole, 129 U. S., 536:—"The case simply
"declares that no Federal question is involved
"when a law properly construed confers no author-
"ity upon a municipality to do the thing which
"is to impair prior contract rights. The converse
"must be true—that a Federal question is pre-
"sented, if, when properly construed, the law of
"the State does prima facie confer authority upon
"the municipality to grant rights and immunities
"which would impair prior contract rights, the
"said municipality, under cover of such State law,
"has, in the manner provided, actually made such
"grant."

And in conclusion he says: "The Federal ques-"tion in all such cases is, does the statute of the "State, or the grant made by the municipality "thereunder, when fairly construed, and treating "it as otherwise valid, present a case falling within "the prohibition of the constitutional guarantee "in question? If the law of a State or a municipal "grant under its authority, is a valid enactment, "except for its repugnancy to the provisions of the "Constitution which prohibits a State from pass-"ing any law impairing the obligation of contract, "then such repugnance presents a Federal ques-"tion, and gives this Court jurisdiction."

In affirming the decision of Judge Baker, this Court says (166 U. S., 562): "There is no doubt "that the Circuit Court had jurisdiction of the case, "notwithstanding the fact that both parties are "corporations and citizens of the State of Indiana. "It should be borne in mind in this connection that "jurisdiction depended upon the allegations of the "bill, and not upon the facts as they subsequently "turned out to be. The gravamen of the bill is "that, under the act of the General Assembly of "1861, and the ordinances of January 18, 1864, and "April 7, 1880, the Citizens' Railroad Company "had become vested with certain exclusive rights "to operate a street railway in the city of Indian-"apolis, either in perpetuity or for a term of thirty "years, or thirty-seven years, which the city had "attempted to impair by entering into a contract "with the City Railway Company to lay and oper-"ate a railway upon the same streets. All that is

"necessary to establish the jurisdiction of the "Court is to show that the complainant had, or "claimed in good faith to have a contract with "the city, which the latter had attempted to im- "pair. Conceding that the Legislature of the State "alone had the right to make such grant, it may, "as was observed in Wright v. Nagle, 101 U. S., "791, 794, exercise its authority by direct legisla- "tion, or through agencies duly established, hav- "ing power for that purpose. The grant, when "made, binds the public, and is directly or indirect- "ly the act of the State. The easement is a "legislative grant, whether made directly by the "Legislature itself or by one of its properly con- "stituted instrumentalities." * * * "That the "complainant had a contract with the city is en- "tirely clear." * * * "That the city did at- "tempt to impair this contract by the agreement "of April 24, 1893, with the City Railway Com- "pany, and its ordinance ratifying the same, is "equally clear. This contract was entered into in "pursuance of a supposed right given by an act of "the General Assembly of March 6, 1891, known "as the city charter, the 59th section of which "enacted that 'the Board of Public Works shall " 'have power—to authorize and empower by con- " 'tract telephone, telegraph, electric light, gas, " 'water, steam or street car or railroad companies " 'to use any street, alley, or any other public place " 'in such city—provided that such contract shall, " 'in all cases, be submitted by said Board to the " 'Council of such city, and approved by them by

"'ordinance, before the same shall take effect.' "This contract and ordinance of April 24, 1893, "even if otherwise valid, should not be construed "to interfere with the rights of complainant to "occupy the streets of the city under the act of "1861 and the ordinance of January 18, 1864, with- "out coming in conflict with that provision of the "Constitution which forbids States from enacting "laws impairing the obligation of contracts."

It is perfectly clear that from whatever source or sources the right emanated, vesting in Keeler and his assigns the right to maintain for a period of thirty years a fixed schedule of water-rates and charges to be paid by private consumers, the medium by which their right became vested was a law.

SECOND.

There can be no doubt but that, in terms, the ordinance attempted to make an irrevocable grant of whatever rights and privileges it attempted to grant. The language is: "The said grantor or "assigns shall charge the following annual water- "rates to consumers of water during the existence "of this franchise."

THIRD.

The right to have maintained a schedule of water-rates and charges, fixed by the municipal authorities, is a special privilege. The relations between a water-company and its customers, in the matters of rates and charges and the duties

and obligations of the one to the other, are identical with those between a common carrier and its customers or patrons.

Wagner v. Rock Island, 146 Ill., 139.
Crumley v. Watauga Water Co., 41 S. W. Rep., 1058.
Lumbard v. Stearns, 4 Cush., 60.
Wheeler v. Northern Colo. Irrig. Co., 10 Colo., 582.
Haugen v. Abilena, L. & W. Co., 14 L. R. A., 424.
People v. Green Island W. Co., 56 Hun., 76.
Spring Valley Water Co. v. Schottler, 110 U. S., 347.

That is to say, to the extent of its capacity, a water-works company, or an individual in like character, must furnish water to every applicant, and at reasonable rates. If those rates are fixed by law, it is a special advantage or privilege either to the purveyor or to the consumer. If they are fixed unreasonably low, they would be of special advantage or a special privilege to the consumer. But if they are not unreasonably low or are unreasonably high, they are of special advantage or a special privilege to the purveyor. It is always assumed that a legislative grant to an individual, if accepted, is of benefit or advantage to the grantee from the mere fact of its acceptance. Consequently, as the sole advantage, to the grantee under the ordinance of November 12, 1888, and his assigns, is the revenue to be obtained by

the sale of water, the schedule of rates and charges fixed by the ordinance must be presumed to be a special advantage or benefit, and the right to maintain them, unchanged, during a fixed period, a special privilege.

In C. G. Ry. Co. v. C. C. Ry. Co., 62 Ill. App., 502, the Court passed directly on two questions involved in this case, and declared that a city ordinance passed under express charter authority is a law, and if it attempt to grant special privileges, not common to others, it comes under the 14th Sec. of the Bill of Rights in the Illinois Constitution and is revocable.

Exactly the same ruling was made by the Supreme Court of Alabama in the Birmingham St. Ry. case, 79 Ala., 465, 473, under a Constitution identical with that of Illinois in this respect.

But plaintiff in error committed itself on this question in its amended answer (Rec. p. 52) wherein it alleges that "relying upon the rights, benefits, "and privileges, franchises and immunities, granted by or contained in the said ordinance, and "particularly upon the rates therein provided to "be paid by said village and by the inhabitants "thereof for a supply of water, as hereinabove "set forth, a large number of persons did associate "themselves together for the purpose of forming "a corporation known as the Rogers Park Water "Company, the present defendant herein."

It is therefore clear that by the General Assembly and its creature, the Board of Trustees, a law was passed granting to Keeler the irrevoc-

able special privilege of maintaining a certain specified schedule of water-rates and charges for a period of thirty years, and as such was clearly unconstitutional and void.

IV. B.

The General Assembly of the State of Illinois, aside from any express constitutional limitations, has no power, either directly or through authority which it vests in its municipalities, to irrevocably establish a schedule of water-rates and charges to be paid by private consumers during any specified period.

This was the only question passed upon by the Supreme Court of Illinois.

The ordinance provides that Keeler or his assigns "shall charge the following annual water-"rates to consumers of water during the existence "of this franchise."

Assuming for the present that the ordinance or contract binding Keeler and his assigns to make certain charges during a certain period, equally binds the consumers to pay the same, or do without, then the question fairly arises, has the legistive branch of the government power to make a binding contract coercing the people, by its terms, when those terms relate only to the private affairs of the people?

It may be presumptuous to suggest that the eminent jurists and lawyers who respectively decided and argued the cases of the class to which

the case at bar belongs, from Munn v. Illinois, 94 U. S., 113, to the present time have reasoned from a false premise, to wit: that the legislative branch of the government in any of the United States has the power, under any circumstances, to establish or fix a price which any vendee must pay for any commodity or any service; but it is respectfully submitted such is the fact.

Take the terms "vendor" and "vendee" in their broadest sense and as generic terms, so that "vendee" shall include all those who buy or get for a price the benefit or use of any commodity which they do not produce themselves, or of any service which they do not perform themselves, and so that "vendor" shall include all those from the vendee gets the commodity or service.

In all ordinary matters, the laws of supply and demand and competition regulate prices, and no one would for a moment admit the power of government to interfere, for these prices are regulated by contract, and every man is free to enter into any contract he chooses. But, when the nature of the business transacted by the vendor is such that he is under a legal duty to sell on demand and the vendee has a legal right to buy, then the vendor is only entitled to a reasonable price and the vendee is only obliged to pay what is reasonable. This is the common law relation between the parties, each having an inherent, inalienable right, held to be a self-evident truth in the Declaration of Independence and guaranteed them in the Bill of Rights in the Constitution of Illinois,

and probably of every other State in the Union. No Legislature nor any sovereign can deprive them of this right. In the exercise of this mutual right, the vendor demands his price, and the vendee's only recourse is to pay the demand and bring his suit to recover back the excess over what is reasonable, and in the trial of such suit the burden of proof is on the vendee to show that the price so demanded and paid is in excess of what is reasonable. The only power which the Legislature can exercise in the premises is to shift this burden of proof, and this it can do under the powers vested in any Legislature, and the expression of the Legislature, in no matter what language it be couched, amounts to no more than a declaration that at the time the enactment be passed, the price or prices mentioned therein are, in the judgment of the legislative body, what are at that time reasonable. It is respectfully submitted that the Supreme Court of Illinois fell into error when it declared that the rates so fixed by the legislative department became binding on the vendor for all the time mentioned, the vendor having accepted the act and proceeded thereunder. If in the course of time it proved from changed conditions that if the vendor should be held to such prices it could not only make no profit, but would be subjected to loss; then it should be allowed to show that the prices had become unreasonably low and to recover what were then reasonable. Otherwise, in a case like that at bar, a water company might accept, in good faith, an

ordinance giving it the right to construct water-works and fixing the rates, the same being based on what was, at the time, a reasonable basis, and, at the end of five years, from some wholly unforeseen reason, it would become impossible to furnish water at such rates without an actual loss. It would be a harsh doctrine that would hold the company to furnish water at such rates, with the possible alternative of quitting business at a loss of almost the entire amount of its expenditures in constructing the plant.

There can be no other theory, reconcilable with the rights of all parties and common justice as well, than that the action of the Legislature in establishing rates is merely the establishment of a rule of evidence, and that the power of the Legislature is continuous, so that one body can not bind its successors.

If these cases are to be decided on the theory advanced in Smyth v. Ames, 169 U. S., 466, that when the prices, mentioned in the legislative enactment, are so low as to give the vendor no profit, the enactment is void, because it takes the property of an individual without due process of law; then any enactment naming prices is void for the same reason, for if an individual vendor has a property right in one per cent profit, he has an equal property right in any percentage of profit he can wring from the vendee.

If, however, the cases are to be decided upon the old-time theory that the courts can always inquire into the reasonableness of the charges mentioned

in the enactment, then they must be based upon the underlying theory that, as between vendor and vendee, the price must be reasonable, and as what may be reasonable, between a vendor and vendee at one time, may be unreasonable at another, the Legislature would practically be shorn of all power in the premises. If the case of Smyth v. Ames were to be started over again today, would the decree be res judicata, or could the parties show that under the conditions as they now exist the prices named are reasonable? If that judgment be a bar to another proceeding, then, unless the Legislature should happen to strike on a price which the Court, at the time the case should be heard, would agree with the Legislature on the question of reasonableness, the enactment would be adjudged unconstitutional, and such adjudication would be a bar to any future reexamination of the question.

Few of these cases have arisen from controversies between the vendor and vendee; between whom always the question of reasonableness is the one of paramount importance and the one ever present. But where the vendee demands the commodity or service and is entitled in law to it upon paying a reasonable price therefor, and the question of what is a reasonable price is put in issue, then it is for the Court to determine in each case what is reasonable, and the one alleging has the burden of proving. The Court is not bound by what the Legislature may have said is reasonable, and the only question is what effect has the enact-

ment. It is either absolutely void and of no effect at all for want of power in the Legislature, or it has effect only as a rule of evidence, making prima-facie reasonable the price mentioned, and throwing upon the party claiming it to be unreasonable the burden of proof. Can then such an enactment be the subject of an irrevocable contract?

Suppose there had been no ordinance fixing rates, neither the alleged ordinance of 1888 nor that of 1897, and defendant in error had demanded water of plaintiff in error and it had been peremptorily refused, the Court on petition would issue its writ of mandamus compelling compliance with the demand and would leave the "company free to charge for its services upon a quantum meruit." Cumberland T. & T. Co. v. Morgans L. & T. R. Co., 24 So., 803.

But, if, upon such demand being made, plaintiff in error had expressed its willingness to comply, upon payment of a certain sum which it should name, defendant in error would have no standing in a proceeding for mandamus, but would be obliged to pay the amount demanded and sue to recover back the excess over which he claimed was a reasonable charge. Then the burden of proof would be on him to show what was reasonable; assuming, however, that the alleged ordinance of 1888 was in force and the price claimed by plaintiff in error was in accordance therewith, and that defendant in error claimed the same to be unreasonably high then his rights and his remedies would be the same and the same burden

of proof would be upon him. It seems to be conceded by the courts that, where in such a case, rates or charges are specified in an enactment, a tender of those rates gives the vendee a remedy by mandamus; and it also seems to be well settled that the respondent may in defense show that the legal requirements are unreasonable.

O. & M. R. R. Co. v. People, 120 Ill., 200.
C. & A. R. R. Co. v. People, 152 Ill., 230.

If then, as between the vendor and vendee, when a statutory price is fixed, the latter has a remedy by mandamus, but the former may successfully defend by showing that the statutory price is unreasonably low, consequently, the effect of the enactment is to give to the vendee a simple, effective, and complete remedy by mandamus when the statutory rates are in fact reasonable. The only question then is, can the Legislature by successive enactments, keeping up with changing conditions affecting the reasonableness of charges, give him this remedy; or is the Legislature bound by its first enactment and the vendee left to his ordinary common-law remedies? One Legislature can not bind its successor.

Cooley Const. Lim., 6th Ed., 146, 343, 349.
E. St. Louis v. E. St. L. G. L. & C. Co., 98 Ill., 415.
Milliken v. Edgar Co., 142 Ill., 528.
Carlyle v. Carlyle W. L. & P. Co., 52 Ill. Ap., 577.

The reasoning of the Appellate Court of Illinois in the Carlyle case is applicable here, whether it was applicable to the case then under consideration or not. In that case, the matter before the Court was simply the extent of the power of a municipality to contract for supplies to be furnished to it. It was not a legislative power, but a contractual power; while here, the power under consideration, is purely a legislative power. In the case of the exercise of purely legislative powers in the consideration of those subjects where each General Assembly corrects evils and insures rights then existing, it must, in the very nature of things, be untrammeled by any act of its predecessors. Otherwise, one General Assembly would not only be a legislative body, but would be a prophet, seer, and revelator, prying far into the future; determining the needs and wants of the people, years in advance; and pass acts binding its successors; and thus, the work of succeeding assemblies, could be narrowed and limited and reduced to merely making appropriations and confirming gubernatorial appointments. This Court is familiar with all its decisions from the early cases of Munn and Rugles to the late Nebraska Rate case, and it is submitted that those, which were not decided with this theory as the basis, would have resulted the same if this theory had been strictly followed. Moreover, this case is between the purveyor and consumer, the vendor and the vendee, while the later and nearly all the earlier cases in this Court have been between the "vendor" and the State.

In this connection, reference is made to a statement of counsel for plaintiff in error in the courts below, that the reasonableness of rates is an exclusively legislative question. It is submitted that no Court in this country concedes this point. From the Munn Warehouse case to the Nebraska Rate case, the courts have tenaciously clung to the right and to the exclusive right of declaring conclusively whether a rate or charge fixed by legislative action is reasonable; conceding only to the Legislature the power to declare what is prima-facie reasonable; and even in the matters under consideration here, the General Assembly of Illinois, in the act of 1891, concedes to the courts the ultimate power of determining the reasonableness of the action of any municipality thereunder, and adds to that power that which, in the Regan Texas case, was held not to exist in the Court, to wit: the power to review and necessarily to amend and correct the municipal action to make it conform to justness and reasonableness.

IV. C.

The village ordinance is void under the Fuorteenth Amendment to the Constitution of the United States, in as much as it takes the property of the consumer of water without due process of law.

Whenever any legislative body establishes rates and charges to be paid to a quasi-public corporation, the presumption of law is that they are rea-

sonable at the time of the enactment; therefore, it must be presumed that the rates and charges fixed by the Chicago ordinance of October 18, 1897, are just and reasonable and, as a necessary conclusion, that the rates and charges as fixed by the Rogers Park ordinance of November 12, 1888, have become and are now unjust and unreasonable; consequently, the Rogers Park ordinance is prima facie or presumptively unconstitutional and void, as taking from the consumer's money or property arbitrarily and without due process of law.

In Smyth v. Ames, 169 U. S., 446, the laws fixing rates and charges were held unconstitutional and void, because the same were fixed so low that they, in effect, took the property of the company without due process of law. If an arbitrarily fixed schedule of rates and charges, because too low, in effect took the company's property without process of law, by parity of reasoning a schedule which arbitrarily fixed the rates unjustly and unreasonably high would take the consumer's or the patron's property without due process of law. The doctrine is equally applicable in the one case as in the other, and should be more readily applied to relieve the people of a burden than to protect the property interests of a corporation. A careful examination of the opinions of the Supreme Court of Illinois in the Ruggles, Munn and Illinois Central cases, the pioneer cases in this line, makes it perfectly apparent that that Court considered that the acts of the General Assembly involved in those cases were simply and solely rules of evidence es-

tablished by the legislative department under which the rates and charges so established should be taken in any court as prima-facie reasonable, throwing the burden of proof on any one objecting to them to show that they were unjust and unreasonable.. Before the passage of those acts, any rates might be charged which the carrier or warehouseman thought could be collected, and the burden of proof was on the shipper to show that they were unreasonable or unjust. It was nearly impossible for the shipper to secure and introduce the necessary proof, which was all in the hands of the carrier or warehouseman. The Legislature took up the matter and, to prevent extortion, established what, from the best sources obtainable, were reasonable and just rates, leaving alike to the carrier or warehouseman and shipper the right to contest in the courts the question of reasonableness and justness; but in all such contests establishing as a rule of evidence that the statutory rates should be prima-facie reasonable and just. The sole object of the acts was to prevent extortion, which brought them clearly within the police power of the State, a power that must be continuing and ever existing in the Legislature, and in the exercise of which, one General Assembly can not hamper its successors. This theory of the Illinois Court was carried out in this Court, but, unfortunately, the objection, urged by the carriers and warehousemen that the obligation of contracts was being impaired, was not met squarely, but evaded and a loophole was left into which the

Fourteenth Amendment has found lodgment, until this court has entirely abandoned the original theory and has declared the Nebraska law unconstitutional, because the rates fixed are so low that the carrier can not pay expenses out of its receipts; and, hence, its property is taken without due process of law. While it is respectfully submitted that the original theory is the true one, and that such a law can not be unconstitutional, though it may be void because it is unreasonable, like any other police regulation, and that the presumption of reasonableness, based upon the rates fixed by law, can in any case be overcome by proof of what is actually reasonable; yet, defendant in error is willing to accept whichever theory this Court may now adopt. For if such a law can be regarded as merely a rule of evidence, throwing the burden of proof in most cases on the carrier, warehouseman, water company, or what not, then it is passed under that power of the Legislature which makes it its duty to protect the people against extortion and unjust discrimination by those who enjoy practical monopolies and can be exercised whenever and as often as the necessity arises, and the Legislature itself is the sole judge of when and how often that necessity arises, and one Legislature can no more bind its successor in this matter than in the passage of purely criminal statutes.

If, on the other hand, the Court should follow this theory of the later cases, that the enactment is of such a position and unyielding nature, that, if it remains as a law, its effect will be to take

property without due process of law, unless upon examination the rates established by it be found to be exactly just and reasonable, then, like a two-edged sword, it must cut either way, for if by being too low the property of the carrier, etc., be taken without due process of law, then by being too high the property of the shipper, etc., is taken without due process of law. Now, every legislative enactment is presumptively just, valid, and reasonable; therefore, the act of 1891 and the ordinance of 1897 are presumptively just, valid, and reasonable, and the water-rates and charges established by the ordinance of 1897 are presumptively just, valid, and reasonable, and any higher rates are presumptively unjust and unreasonable, and therefore take the property of the water consumer without due process of law, and the ordinance is void under the Fourteenth Amendment. The water consumer's money is his property, as much as the water company's money is its property, and the law that protects the property rights of the one should protect the property rights of the other, and to the courts we ultimately look for that equal protection under the laws which the Constitution guarantees to us.

In I. C. R. R. Co. v. People, 95 Ill., 313, the charter provided that "the board of directors shall "have power to establish such rates of toll for the "conveyance of persons and property upon the "same [the road] as they shall from time to time "by their by-laws direct and determine, and levy "and collect the same for the use of said company."

The Court held that while the charter was a contract, the right to establish rates of toll was not placed exclusively in the board of directors, and that the Legislature might exercise its powers in that behalf to prevent extortion.

The prior case of Ruggles v. People, 91 Ill., 256, came with the I. C. case to this Court, and both are reported in 108 U. S., the former at page 526, the latter at page 541. The charters under consideration in those cases are similar. In his separate opinion in the Ruggles case, Mr. Justice Harlan differs with the Court in one particular, namely, he holds that the charter was a contract whereby the company "acquired an exemption from abso-"lute legislative control as to rates," but he interpolated the element of reasonableness in the exercise of that contract right, and thereby in effect held that neither the Legislature nor the board of directors could establish rates of toll which were unreasonable, and as it did not appear that the rates fixed under the subsequent act of 1871, were unreasonable, he therefore concurred in the ultimate results of the decision of the Court. Reading into this case, Mr. Justice Harlan's doctrine, and we have it that the consumers have an inalienable right to have water from the plaintiff in error at reasonable rates, and as it does not appear that the rates, established by the ordinance of 1897, are unreasonable, they must prevail.

IV. D.

The General Assembly of Illinois by Section 1, Article X., Chapter 24, R. S., did not attempt to empower the Village Board to establish a schedule of water-rates and charges to be paid by private consumers.

The language of this section, so far as material here, is that "the Board of Trustees shall have the "power to provide for a supply of water, and to "authorize any person or private corporation to "construct water-works and maintain the same at "such rates as may be fixed by ordinance, and for "a period not exceeding thirty years."

"A doubt destroys a grant." As will be seen, this rule is applied in construing the powers of a municipal corporation the same as in case of a private corporation. Therefore, if there be any doubt concerning the claim that the above language empowered the Village Board to fix irrevocably and irrepealably, for a period of thirty years, a schedule of water-rates and charges to be paid by private consumers, then the supposed grant of power is destroyed.

It must be always borne in mind that the power in the Legislature to fix rates is the police power, and its exercise in the premises is to prevent extortion and unjust discrimination; and that the very strongest presumptions are against any curtailment of that power, even if it be conceded that it can be curtailed at all.

In the first place, it is not expressly stated, nor necessarily implied, that the rates to be fixed by ordinance are the rates to be paid by private consumers. It is a well-known fact, and one emphasized by the ordinance in question, that there may be one set of rates for the municipality to pay and a different one for the private consumer to pay. The municipality itself must use water for flushing sewers and extinguishing fires.

In the second place, nothing in the language of the statute can be inferred to authorize the Village Board to fix any rate by ordinance irrevocably and irrepealably, and, in view of the language of Sec. 14, Art. II., Constitution, it must be presumed that the General Assembly did not intend to declare that such ordinance might, at the will of the Village Board, be irrevocable or unchangeable in terms. And in the third place, there is no reason for applying the language "and for a period not "exceeding thirty years" to the continuance of an unchanged schedule of rates and charges. If it had been intended that this phrase should have the application claimed, the word "and" is superfluous, and the comma preceding it is out of place, and the sentence would have read simply, "to con-"struct and maintain the same at such rates as "may be fixed by ordinance for a period not ex-"ceeding thirty years." It is true that punctuation marks are worthy of little consideration in construing a statute, but it is submitted that this
1 comma, taken in connection with the conjunction
3 when the rule of strict construction is to be ap-

Lines numbered 3 and 7 misplaced.

following, it is worthy of some notice, especially which the water-works may be maintained by the plied. Giving some weight to this punctuation mark and the succeeding conjunction, the clause is undoubtedly referable to the period during grant or license, and as its force may be exhausted in this one application there is no ground for giving it a double application without express words to that effect.

While legislative action has little weight with the courts in the interpretation of a statute, it is entitled to some consideration. The above-quoted clause is a part of the city and village incorporation act, which was approved April 10, 1872. At the same session, the General Assembly passed an act entitled "An Act to enable cities and vil-"lages to contract for a supply of water for public "use and to levy and collect a tax to pay for the "water so supplied," approved, April 9, 1872. Both acts went into force, July 1, 1872. The latter act was amended both in title and in body in 1885, so as to include incorporated towns and as so amended is still in force; and provides that such municipalities may contract with the owners of water-works "for a supply of water for public use "for a period of not exceeding thirty years." Again, in 1891, the General Assembly passed the act, under which the city ordinance of 1897 was passed, authorizing municipalities to prescribe by ordinance maximum rates to be charged by prior existing companies as well as those subsequently to be created. It is apparent from these that the

General Assembly treated the phrase "and for a "period not exceeding thirty years" in the general city and village act, as referring to the period of the license or grant to operate and not to the fixity of rates and charges.

In I. C. R. R. Co. v. People, 93 Ill., 315, the charter before the Court provided that the board of directors should have power to establish rates of toll from time to time and levy and collect the same, but that Court held, and was sustained by this Court, that "all this is, by necessary implica- "tion, subject, as all citizens are, to the legislative "powers of the State to define, prohibit, and punish "extortion." Subsequent decisions fully sustain the decision in that case and the Ruggles case that nothing but the most direct, positive, and unequivocal language of a grant can take from the Legislature this greatest and most beneficent of all its powers, to define, prohibit, and punish extortion.

IV. E.

Plaintiff in error is subject to any regulations or provisions that the General Assembly may at any time deem advisable to prescribe.

It was alleged and admitted that plaintiff in error was incorporated under Chapter 32, Rev. Stat. Ill., Section 9 of which, without the proviso, is as follows:

"The General Assembly shall, at all times, have "power to prescribe such regulations and provi- "sions as it may deem advisable, which regula-

"tions and provisions shall be binding on any and "all corporations formed under the provisions of "this act."

That acting under this reservation of power the General Assembly could, at any time, prescribe reasonable regulations and provisions governing the corporation is settled beyond question by the following cases:

Ford v. Chicago M. D. Ass., 155 Ill., 166.
Penn. Coll. Cases, 13 Wall., 190, 213.
Miller v. New York, 15 Wall., 478.
Shields v. Ohio, 95 U. S., 319.
Greenwood v. Freight Co., 105 U. S., 13.
Spring Valley W. W. v. Schottler, 110 U. S., 347.
Sioux City St. R. Co. v. Sioux City, 138 U. S., 98.
State v. R. R. Tax Comsn., 37 N. J. L., 228.
Inland Fisheries v. Holyoke W. P. Co., 104 Mass., 446; 15 Wall., 500.

Citizens Savings Bk v Owensboro 173 U.S. 636

In Shields v. Ohio this doctrine was applied to a change in railroad rates, and in Spring Valley v. Schottler to water-rates. No question is made in this case that the Chicago ordinance of October 18, 1897, establishes unjust or unreasonable rates, and if it did, the act of 1891 under which it was passed, gives ample remedy for correcting it. Nor is it claimed that the fixing of water-rates is not a regulation. In fact, it was claimed that this was a rule and regulation of the company; and if it was, the Legislature reserved the right to prescribe it.

IV. F.

The Village Board of Rogers Park did not pass the ordinance in question November 12, 1888, and there is no evidence in the record that the same was ever passed.

The fact, which was admitted on trial, that the Rogers Park Water Company has, ever since a date very soon after November 12, 1888, operated a water-system in the territory then embraced in the village of Rogers Park, and has all the time been recognized by that village and the city of Chicago as operating the same under due legal authority, does not even raise the slightest presumption that a schedule of rates has been established by ordinance, and, in fact, simply raises the presumption that the company is there by right or permission with its common-law duty to furnish water at reasonable rates.

A direct issue was made by plea on the passage of the ordinance set up in the answer as having been passed by the Village Board of Rogers Park, November 12, 1888. To sustain that issue appellant introduced in evidence a copy of an ordinance, to which was attached the certificate of the City Clerk of the city of Chicago, in which he certified that the same was a true and correct copy of an ordinance passed by the Board of Trustees of the Village of Rogers Park November 12, 1888, and recorded in Book of Ordinances. This was in compliance with Sec. 11, Art. VI., Chap. 24, Rev. Stat.

Ill., which makes a copy, so certified, "prima-facie "evidence" of the passage of the ordinance.

But this prima-facie evidence may be completely overcome by the journal of the meeting at which the ordinance is claimed to have been passed if the record of such meeting shows that no such action was taken.

Lindsay v. Chicago, 115 Ill., 120-124.

In Spangler v. Jacoby, 14 Ill., 297, the Court, on page 300, says: "But when the journal is in ex- "istence, and it fails to show that the act was "passed in the mode prescribed by the Constitu- "tion, the presumption is overcome, and the act "must fall."

In Ryan v. Lynch, 68 Ill., 160, the Court in considering a certified copy of the journal of the State Senate says, on page 163: "It proves what pro- "ceedings were had in the Senate in relation to "the passage of the bill, and there can be no in- "ference that any other proceedings were had, for "it is shown that all are given that relate to the "subject," and on page 164: "the bill, therefore, "never became a law. * * * It was as com- "pletely a nullity as if it had been the act or "declaration of an unauthorized assemblage of in- "dividuals."

In I. C. R. R. Co. v. People, 143 Ill., 434, 441, it is said: "It is not denied that the amendatory act "received the signatures of the speakers of both "houses and the approval of the Governor. Such "verification is prima-facie evidence of its validity

"as a legislative enactment; but it is the settled "law of this State that the journals of either "branch of the Legislature may be resorted to for "the purpose of overcoming such prima-facie evi-"dence. It may be shown from the journals that "an act was not passed in the mode prescribed by "the Constitution."

Section 40, of the City and Village Act, Chap. 24, Rev. Stat. Ill., in prescribing the duties of the Board of Trustees declares: "It shall keep a jour-"nal of its own proceedings."

The journal was produced by a clerk from the City Clerk's office, whose testimony is set out in pages 84-88 of the Record, from which it appears that the journal showed the full record of a meeting beginning with the words: "Regular meeting. "November 12, 1888, Present: Mess. Daly, Phelps, "Sturgis, Roberts, Phillips, Ceperly," and ending with the words: "On motion of Mr. Phelps, ad-"journed." That between such beginning and such ending, no record is made of the passage of the ordinance in question; that about in the middle of the record of this meeting, and on the margin is written, in ink, the words "here insert amend-"ment." It does not appear from the record of this case that there was any amendment of the record authorized by the Board. After the ending of the record of the meeting, and after the words "on motion of Mr. Phelps, adjourned," is written the following, in ink: "Amendment. The ordi-"nance granting the franchises for water supply "to H. E. Keeler was read by the clerk and amend-

"ments noted. Mr. Phelps moved that the ordi-"nance be passed as read. Ayes: Phelps, Sturgis, "Roberts, Phillips; nays: Ceperly." Then on the margin of the record, where these last-quoted words are written, appears the word "void" in lead pencil, and across these last-quoted words are twelve straight pencil marks drawn criss-cross. It does not appear from the record who wrote the amendment or when it was written, nor does it appear from the record who wrote the word "void," or who made the criss-cross lines, nor when the one was written or the others were made.

There is no doubt but that the journal is conclusive evidence of what did transpire at the meeting, and its silence on any question is conclusive evidence that such question was not before the board. Therefore, the prima-facie evidence of the passage of the ordinance made by the certificate of the city clerk is absolutely overcome by the journal, as the same appears to have been originally written up. Admitting the law to be that the Village Board could order its record amended at any time, it does not appear that such order was ever made by the Board, or that any amendment to the record, as originally written up, was ever authorized by it. Admitting, also, the law to be that the same clerk who wrote the original record could, without an order from the Board, correct the same or insert something which he inadvertently or negligently had left out, yet it does not appear from this record that the same clerk who wrote this amendment wrote the original.

The question then is, does the finding of a purported amendment, following the original record, without proof that it was ordered by the Board, or that it was written by the same clerk who wrote the original, raise the presumption that the amendment discloses the truth as to the facts? If it does, then the finding of the word "void," written on the margin of the amendment, and the striking out of the amendment by the criss-crossing raises the presumption that they represent the true facts and the latest information and conclusions, as to what are the true facts. If the condition of the record is to raise any presumptions which will do away with the necessity of direct proof, then the condition in which it is found must be presumed to be a declaration of what was the fact, namely, that the record was written up originally showing all that was done at the meeting; then, as an afterthought, the amendment was added; and then, upon more mature deliberation and additional reversion to the memory, or, perhaps, with the memory aided by something extrinsic, the amendment is stricken out.

It is respectfully submitted, that to any one experienced in the proceedings of municipal legislation bodies, it would appear that at the meeting of November 12, 1888, some one made some mention of the ordinance in question, and that in the hurry of taking rough minutes of the meeting the clerk either made no memorandum of it at all, or made some mark, relying upon his memory to supply what he had not time to write; that when he

came to write up the journal, he did not notice his mark, if he made one, or if he had made none, forgot what had been said or done, and, then, when his record was written up, he recollected that something had been said about it, and wrote up what now appears as an amendment to the record; and, proceeding on that theory, recorded the ordinance as having been passed on that day. Then, when the journal was read at a subsequent meeting for approval, and when he was using a pencil and not a pen he corrects his error by writing the word "void," and striking out the amendment and leaving the record as it was originally written.

The clerk who produced the journal in court testified that he had been an employe of the city clerk since May 1, 1895, and that he did not remember ever having seen this amendment without the erasures or erasing marks or the word "void." Here is a record more than nine years old which had been in the custody of the city clerk as successor to the village clerk since the annexation of the village to the city, April 4, 1893. It is produced in court by a clerk from the city clerk's office who has been in the employ of the city clerk since May 1, 1895, who does not know who made the pencil erasures, but thinks they were not made in the city clerk's office, and who never saw the amendment without them.

In the matter of the estate of Tomlinson, 133 Pa. St., 245, the Court discusses the legal effect of lead-pencil cancellations of ink-written documents and cites Myers v. Vanderbilt, 84 Pa. St., 510, in

which are collected the authorities holding as admissible in evidence, contracts, notes, book-accounts, and wills written in pencil, and it is respectfully submitted that if the Court shall presume that the village clerk wrote the amendment it shall also presume that he made the cancellation, and that that which appears to have been done last in time expresses the truth and that the ink-written amendment is canceled by the pencil marks and writing.

Writing a brief for defendant in error in this Court is like preparing for trial at nisi prius—trying to anticipate what plaintiff may say, or do. In the courts below, it relied on its claim that it had a certain contract right created by the village ordinance of 1888, the obligation of which was impaired by a subsequent law; and the claim that such subsequent law took property without due process of law refers only to that property right which it claimed to have in the contract. If it had such a contract, and it were irrevocable and unchangeable under the Constitution and laws of Illinois, in force when it was entered into, then his conclusion would be correct; but if it had a contract at all, and it was made without power it was void; or, if made with power but with the right reserved, either by Constitution or special or general law to modify or repeal, it may be modified or repealed at any time and does not create an irrevocable contract.

Respectfully submitted,

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Attorney for Defendant in Error.

It is not claimed that the rates fixed by the ordinance of 1897 are lower than what is reasonable and just, and must, therefore, be presumed to be reasonable and just, and as the consumer is entitled, statute or no statute, ordinance or no ordinance, to water at reasonable and just rates, the excess is not the property of the plaintiff in error, and depriving it of such excess is not the taking of property.